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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC., ET AL.,
Respondents

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; NATIONAL PRESS CLUB; ASSOCIATED PRESS MANAGING EDITORS; WEST VIRGINIA PRESS ASSOCIATION; ILLINOIS PRESS ASSOCIATION; AND CLARKSBURG PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE, AND BRIEF *AMICI CURIAE*.

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The American Society of Newspaper Editors, the Radio Television News Directors Association and others, whose interest is set forth below with particularity, respectfully move this Court, pursuant to Supreme Court Rule 42(3), to file the accompanying brief as *amici curiae* in support of affirmance of the decision of the Supreme Court of Appeals

of West Virginia. The attorneys for the Respondents have consented to the filing of this brief.[1] Although the attorney for the Petitioners has given his consent to the filing of an *amicus* brief supporting reversal of the court below, he has failed to respond to the requests of the *amici* for his consent.

Amici are organizations whose members consist of publishers, broadcasters, editors, and journalists throughout the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Radio Television News Directors Association includes approximately 1500 members who supervise, gather, report and edit news and other public affairs information that is broadcast throughout the nation.

The National Newspaper Association is a national trade association of 6200 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The National Association of Broadcasters is a nonprofit association of radio and television broadcast stations and networks. Its membership includes 2607 AM stations, 1981

[1]Letters of consent from the attorneys for the Respondents have been filed with the Clerk of this Court simultaneously with this motion.

FM stations, 557 television stations and the major nationwide commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi is a society of students and practitioners of journalism. It has over 158 student chapters, 134 professional chapters, and more than 35,000 members, among whom the most distinguished journalists in the United States are included.

The Reporters Committee for Freedom of the Press is a nonprofit unincorporated legal defense and research fund devoted to the protection of the First Amendment and freedom of information rights of working press personnel of all media.

The National Press Club is the largest press club in the United States with over 4800 members in 49 states and the District of Columbia.

The Associated Press Managing Editors is an organization of 600 editors affiliated with the Associated Press, which is the largest news collection organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The West Virginia Press Association represents approximately 70 daily and weekly newspaper publishers throughout West Virginia.

The Illinois Press Association is a trade association representing approximately 700 daily and weekly papers throughout the state. Founded in 1865, it is the nation's largest press association.

The Clarksburg Publishing Company is the publisher of *The Clarksburg Exponent*, *Clarksburg Telegram*, and *Sunday Exponent-Telegram*, published in West Virginia, with a combined circulation of approximately 30,000.

Amici believe that the information published in the instant case is necessary for the people to make informed judgments concerning one aspect of the system of government under which they live. Hence, the publication in question involves those values that lie at the very core of the First Amendment and are protected by a rule of constitutional privilege against any governmental infringement. The existence of a free press depends on the ability to publish without first having obtained official imprimatur. Without this limitation on governmental power, all the other protections of the First Amendment, which this Court has articulated throughout its nearly two centuries of existence, would be reduced to chimera.

Because of the importance of the issues presented to this Court in the instant case, the above-listed *amici* desire to present their views to this Court for its assistance.

WHEREFORE, *amici* respectfully request this Court to grant this motion and permit them to file their brief *amici curiae* attached hereto and submitted herewith.

Respectfully submitted,

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INTRODUCTORY STATEMENT

The American Society of Newspaper Editors, the Radio Television News Directors Association and others, whose interest is set forth below with particularity, hereby submit this joint brief as *amici curiae* in support of affirmance of

the decision of the Supreme Court of Appeals of West Virginia. The *amici*, believe that the question presented in this case is clear — whether West Virginia Code § 49-7-3, which outlaws newspaper, but not broadcast, publication of the name of a juvenile delinquent without prior approval by a court, and which prescribes no standards to govern the discretion exercised to permit such publication, constitutes a prior restraint on freedom of the press in violation of the First Amendment.

We submit and will show that the issue in this case implicates the ability of the press in the United States to function as a free, independent and effective institution. We, therefore, urge this Court's affirmance of the decision reached below.

INTEREST OF THE *AMICI*

Amici are organizations whose members consist of publishers, broadcasters, editors, and journalists throughout the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

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The Supreme Court of Appeals of West Virginia has heeded the admonitions of this Court. Faithful to the dictates of the First Amendment, that court has removed a legislatively imposed barrier on the ability of the press to freely report to the public information on one aspect of the state's system for administering justice. *Amici* believe that to sanction this limitation would threaten the ability of the press to inform the public about a vital aspect of this system and ultimately its ability to inform the public on all matters needed for the people to make informed judgments on their system of government. Hence, *amici* submit this brief to urge this Court to vindicate their interests, and those of the public that the press serves, against constitutionally prohibited governmental action.

ARGUMENT

I. WEST VIRGINIA CODE SECTION 49-7-3 CONSTITUTES A PRIOR RESTRAINT ON PUBLICATION.

The manner in which the Court states the question presented in this case — whether the statute creates a prior restraint that violates the First Amendment — suggests that it harbors doubt about the statute's identity as a prior restraint. *Amici* submit that under the analysis of this Court in recent cases, no doubt can remain on this question.

The classic model of a prior restraint is a system under which publication is prohibited without advance approval by an official. T. Emerson, The System of Freedom of Expression 505 (1970); *see Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 55-56 (1961) (Warren, C.J., dissenting). The identifying mark of a prior restraint is its censorship effect; officials have the power to interdict or delay speech before its expression. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 552-53 (1975). West Virginia Code section 49-7-3 does not outlaw all newspaper publications of delinquents' names, only those publications that are not first authorized by a court. Clearly, then, that statute is a prior restraint.

The only distinction between the statute in question and the more usual form of prior restraint is that a judge rather than an executive official administers the restraint. But as this Court's decisions abundantly demonstrate, it is functionally irrelevant to the purposes of the First Amendment whether an executive official or a court administers the requirement for advance approval. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The effect upon speech is identical; sanctions are imposed not because the message is

illegal, but because the message is published without permission. Indeed, if prior application must be made to the judiciary, the restraint upon speech could be intensified. Such a restraint is often administered through, or reinforced by, an injunction, and the validity of an injunctive restraint on publication cannot be challenged at a contempt hearing after the injunction has been violated. *See Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *cf. Nebraska Press Ass'n* v. *Stuart*, *supra* at 559. Hence, whether application must be sought from executive officials or the judiciary, is, under this Court's decisions, a distinction without a difference. *See, e.g., Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n* v. *Stuart*, *supra; New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam); *Near* v. *Minnesota ex rel. Olson*, *supra*.

II. THE FIRST AMENDMENT CREATES A CONSTITUTIONAL RULE OF PRIVILEGE UNDER WHICH RESPONDENTS' MAY NOT BE SUBJECT TO PRIOR RESTRAINT.

A. As Respondents' Publications are Truthful, Accurate, Factual Reports Involving an Aspect of the Functioning of Government, and Their Information Was Lawfully Obtained, Respondents are Prima Facie Entitled to the Protection of the First Amendment.

Through the enactment of section 47-7-3, West Virginia has made illegal the newspaper publication of the name of a delinquent child without prior court permission. *Amici* assert that the publication of this information fully merits complete constitutional protection, at very least when the publisher did not employ illegal means to obtain the delinquent's name. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837 (1978). Central to *amici*'s contention is that Respondents' publications are imbued with three attributes that this Court has identified as salient features in its decisions extending First Amendment protection to both published material and speech.

First. The juvenile justice system is clearly both a "governmental affair," *see Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *cf. Landmark Communications, Inc.* v. *Virginia*, *supra* at 837-39, and a matter of public concern and importance, *cf. Pell* v. *Procunier*, 417 U.S. 817, 830 n.7 (1974); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940). Juvenile courts were established as an entity of the judicial system separate from the criminal courts on the theory that delinquent children should not be subjected to the harshness of the criminal process. *In re Gault*, 387 U.S. 1, 14-16 (1967); *Kent* v. *United States*, 383 U.S. 541, 554-55 (1966); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281, 282 (1967). Hence an article on the juvenile justice system clearly falls within the *Mills* definition of discussions of "governmental affairs," which covers discussion of the structure and form of government and the manner in which government is or should be operated. 384 U.S. at 218-19.[1] Moreover, because of the disappointing results realized by the juvenile justice system, *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543-45 (1971); *Kent* v. *United States*, *supra* at 555-56, the system has come under a torrent of criticism. *E.g.*, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967). The result has been ever increasing pressure for change and for the trial of many youths as adults. Clearly, then, the proper functioning of the juvenile

[1] By applying the due process clause to the procedures used in juvenile court, *e.g., In re Winship*, 397 U.S. 358 (1970); *In re Gault*, *supra; see McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), this Court has recognized the juvenile justice system as a function of state government.

justice system is a matter of great public concern. *See generally IJA/ABA Juvenile Justice Standards Project*, 57 B.U.L. Rev. 617 (1977).

The protection of discussion of governmental affairs and matters of public concern as a major purpose of the First Amendment has been a constant theme running through this Court's opinions. For example, in *Thornhill* v. *Alabama*, 310 U.S. at 101-02, the court proclaimed that at very least freedom of speech embraced the truthful, public discussion of "all matters of public concern without previous restraint or fear of subsequent punishment," to adequately supply "the public need for information and education with respect to significant issues of the times." *Accord*, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 230 (1936). *See also* 2 T. Cooley, Constitutional Limitations 885 (8th ed. 1927). The need to freely discuss society's problems, protected by the First Amendment, overcomes even the need for courts to restrain out-of-court attacks on the conduct of their judicial affairs. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946).

Concomitantly, the Court has voiced the recognition that in modern society individuals have only limited time and resources with which to observe for themselves the operations of government. Consequently, they must rely on the media as their "eyes and ears," *Houchins* v. *KQED, Inc.*, 98 S. Ct. 2588, 2594 (1978) (plurality opinion), to digest and present the facts of those operations, *Estes* v. *Texas*, 381 U.S. 532, 539 (1965). Especially with respect to judicial proceedings, "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975). Not without justification has this Court regarded the press as "the handmaiden of effective judicial administration . . . guard[ing] against the

miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966); *cf. Mills* v. *Alabama*, 384 U.S. at 219.

Second. These publications are, beyond dispute, truthful and accurate descriptions of the events that transpired. The functions of free speech and a free press are so fundamental that this Court has extended extraordinary constitutional protection to false statements of fact concerning government officials and public figures. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *cf. Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Hence, it would be the height of irony for the Court to deny protection to publishers of truthful statements of governmental affairs. *Cf. Landmark Communications, Inc.* v. *Virginia, supra; Cox Broadcasting Corp.* v. *Cohn, supra.*

Third. The means by which the delinquent's name was procured brings Respondents within the protection of the First Amendment; they relied primarily on public officials who knew the delinquent's name. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491, 495, this Court held that the press could not be subject to civil liability for publishing information it obtained through a court record. *Cf. Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Logically, however, protection for publishing material obtained from public sources cannot be limited to that obtained from court records. *See Oklahoma Publishing Co.* v. *District Court*, 430 U.S. at 310 (information was placed in the public domain). Indeed, in *Landmark Communications Inc.* v. *Virginia, supra*, the material could only have come from a public official or other state employee. Yet the Court held that publishing the information so obtained could not be punished consistent with the First Amendment. The plurality opinion in *Houchins* v. *KQED, Inc.*, 98 S. Ct. at 2594, synthesized these and other cases, concluding that

"the government cannot restrain communication of whatever information the media acquires — and which they elect to reveal."

Altogether, *Houchins, Oklahoma Publishing, Landmark* and *Cohn* hold that if the government has a legitimate expectation of confidentiality, it must ensure that confidentiality by withholding that information from the public. These cases stand for the proposition that once that information has escaped the confines of the government circle and found its way into the public domain, the press may publish it with impunity, at least so long as the press used no illegal means to obtain that information. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 837; *Craig v. Harney*, 331 U.S. at 374.[2]

The West Virginia statute acutely undermines the ability of the press to serve the functions in a free society that this Court has recognized as vital. In addition to its immediate effect is the potential for abuse that such a ruling would have. A ruling by this Court upholding the West Virginia statute will encourage local jurisdictions to try to shield various parts of their operations from disclosure by imposing punishment on the press for publishing confidential information.

Such a decision could represent a first intrusion of government into the function of newspaper editors — to decide what will go into a newspaper. *Miami Herald Publishing*

[2]Moreover, in this case, the name of the delinquent was a matter of general public knowledge. It had been broadcast over three radio stations. *Cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 567; *id.* at 595-56 (Brennan, J., concurring); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 493-94, *quoting* Restatement (Second) of Torts § 652D (Tent. Draft No. 13, Apr. 27, 1967).

It would be ironic that if the Court upholds the West Virginia statute, the privacy interest of a rape victim will not protect her name from publication while that of the alleged rapist will be protected if he is a juvenile, even if both names are in the public domain.

Co. v. *Tornillo*, 418 U.S. 241, 258 (1974). The Court there stated:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation can be exercised consistent with First Amendment guarantees . . . as they have evolved to this time.

Id. at 258.

The case before the Court presents the other side of the coin from *Tornillo*. Rather than indirectly inhibiting the vital functions of the press, the state reduces the coverage of governmental affairs by directly prohibiting the publishing of information it does not wish the public to receive. Thus the ultimate effect of such a law is to sanction direct government regulation of the content of a newspaper, to permit a state to do directly what it cannot do indirectly. In vitiating *Tornillo*, this Court would set out on a path that would lead to "[a] popular Government without popular information, or the means of acquiring it," which Madison noted, "is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 Writings of James Madison 103 (G. Hunt ed. 1910).

B. BECAUSE RESPONDENTS' PUBLICATIONS MERIT PRIMA FACIE CONSTITUTIONAL PROTECTION, THE STATE MAY NOT IMPOSE A PRIOR RESTRAINT ON THOSE PUBLICATIONS EXCEPT BY DISCHARGING A PARTICULARLY HEAVY BURDEN TO SHOW THAT ITS LAW COMES WITHIN A SUBSTANTIVE EXCEPTION TO THE RULE AGAINST PRIOR RESTRAINT, DOES NOT ALLOW THE OFFICIAL WHO ADMINISTERS THE LAW TOO GREAT DISCRETION, AND PROVIDES FOR MEANINGFUL JUDICIAL REVIEW.

This case thus involves a statutorily imposed prior restraint that impacts directly upon the exercise of fundamental First Amendment rights. All prior restraints come before this Court presumptively unconstitutional. *E.g., New York Times Co.* v. *United States*, 403 U.S. at 714; *Carroll* v. *President and Comm'rs*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). The state must bear a heavy burden to justify the imposition of such a restraint. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 545, 558, and must demonstrate that its regulation affects only those substantive matters that this Court has identified as exceptions to the First Amendment rule against prior restraints. *Id.* at 592 (Brennan, J., concurring); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. at 559. Even if the state can bear this burden successfully, it must provide standards that impose strict limitations on the discretion of the official administering the restraint, *e.g., Hynes* v. *Mayor and Council*, 425 U.S. 610, 616-18 (1976); *Shuttelsworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938), "procedural safeguards designed to obviate the dangers of a censorship system," *e.g., Southeastern Promotions, Ltd.* v. *Conrad*, *supra* at 559-62; *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), and an opportunity for prompt and meaningful judicial review with the burdens of going forward and proof on the government, *Freedman* v. *Maryland*, *supra*, at 58; *see Bantam Books, Inc.* v. *Sullivan*, *supra* at 70-71; *cf. Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-42 (1957). *See generally* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). *Amici* submit that Petitioners have not, indeed cannot, satisfy their burden.

1. Respondents' Publications Do Not Fall Within One of the Substantive Exceptions to the Rule Against Prior Restraint.

The First Amendment's protection against prior restraint is broad and the exceptions to the rule correspondingly narrow; there are only three. A publication may be subject to prior approval when it implicates the need to protect "the primary requirements of decency . . . against obscene publications" or the security of "community life . . . against incitements to acts of violence and the overthrow by force of orderly government . . . ." *Near* v. *Minnesota ex rel. Olson*, 283 U.S. at 716. The third exception involves the suppression of military information when the nation is at war. *Id.*; *cf. New York Times Co.* v. *United States*, *supra*.

It belabors the obvious to state that none of these exceptions apply to the case bar. As its sole interest,[3] the Petitioner alludes to this Court's statement in *In re Gault*, 387 U.S. at 25, that

> there is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide for the confidentiality of records of police contacts and court action relating to juveniles.

[3]Here the state does not advance an interest in the delinquent's receiving a fair trial. *Cf. Nebraska Press Ass'n* v. *Stuart*, *supra*. Indeed, it could not advance such an interest because juvenile trials are conducted to judges, whom this Court assumes will act responsibly to "ignore the public clamor or media reports and editorials in reaching their decisions . . . ." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 839.

Relying on *Government of Virgin Islands* v. *Broadhurst*, 285 F. Supp. 831 (D.V.I. 1968), the Petitioner argues that the limitations placed upon the press were justified in light of the interest of rehabilitating juvenile offenders.

In short, Petitioners are asking this Court to create a new exception to the rule against prior restraints for the names of juvenile delinquents. *Amici* most strenuously assert that such an exception to one of the premier protections of a free press in this country would be most inappropriate. In *Nebraska Press*, the state effectively invited the Court to engraft another exception on the prior restraint rule to protect the right to a fair trial guaranteed by the Sixth Amendment. 427 U.S. at 594 (Brennan, J., concurring). The Court, however, refused to order the priority among constitutional rights. *Id.* at 561 (majority opinion). In the present case, there is not even a possible conflict between constitutional rights; the conflict is between a fundamental constitutional right and a state created remedy to a perceived evil.

Even if an interest of less-than-fundamental constitutional importance could ever support an exception to the First Amendment rule against prior restraints, the Petitioners have failed to show by specific facts that even a statute requiring all media that wish to publish names of delinquents to submit such publications for prior approval would necessarily, or even arguably, advance the cause of juvenile rehabilitation. Indeed, this Court has indicated its doubt that juvenile proceedings complete with the mantle of secrecy, has advanced the cause of juvenile rehabilitation one iota. *McKeiver* v. *Pennsylvania*, 403 U.S. at 543-45; *In re Gault*, 387 U.S. at 17-20. Thus, even if juvenile rehabilitation were an interest sufficient to subordinate fundamental First Amendment rights to the shackles of a prior restraint, the state has failed to produce "actual facts" to demonstrate that the publication of delinquents'

names present a clear and present danger to that interest. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 842-44.

Moreover, even when a state's interest is sufficient to restrict First Amendment freedoms, its statute must be framed to utilize the least restrictive means that necessarily furthers only that interest. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *see Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70. As *amici* have already noted, *see* pp. 9-10 *supra*, *Houchins*, *Oklahoma Publishing*, *Landmark Communications* and *Cohn* taken altogether require the state to maintain confidentiality by withholding the information for which it seeks secrecy from the public rather than punishing its disseminators or restraining its dissemination once the information has reached the public domain. That approach is entirely consistent with the *Gault* dictum. Whether there is an interest in rehabilitation sufficient to support the state statute in question, *cf. Gregg* v. *Georgia*, 428 U.S. 153 (1976) (upholding death penalty), when such a less restrictive means is available, indeed is constitutionally mandated, denying the press the protection of the First Amendment would fly in the face of nearly 200 years of constitutional adjudication. Here, as in *Nebraska Press*, the information under the prior restraint was already public knowledge. Having reached the attention of the public, that information may no longer be shielded from publication.

Finally, the statute suffers from the constitutionally prohibited infirmity of according unequal treatment among the media based on content to protected First Amendment interests. *See Police Dep't* v. *Mosley*, 408 U.S. 92, 94-96, 99-102 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). The statute reaches publication but makes no attempt to require prior approval of broadcast of the identical information. The Petitioners can hardly claim that its disparate treatment of newspapers necessarily furthers its

asserted interest. The statute prohibits *only* newspaper publication. The state has not attempted to show, indeed it could not show consistent with common sense, that suppressing only newspaper publication, while permitting broadcast, or other media circulation, of delinquents' names will result in juvenile rehabilitation. For that reason the statute must fall as being underinclusive.

2. West Virginia Code Section 49-7-3 is Unconstitutional in That It Imposes No Standards on a Judge's Discretion to Permit or Forbid Publication and Does Not Provide for Expedited Judicial Review.

Under West Virginia Code section 49-7-3, a judge may grant or withhold permission to publish the juvenile's name for any reason or no reason at all. His authority is completely unfettered. Thus in a case like this, when the information has already reached the public and the confidentiality provision would serve no further purpose, a judge may still withhold permission to disclose the name, thus making its newspaper publication punishable. Such unfettered discretion has been heretofore anathema. *See, e.g., Shuttlesworth* v. *City of Birmingham*, 394 U.S. at 150-51 & n.2.

The statute also contains significant procedural defects. The fact that a judge first passes upon a newspaper's request to publish the juvenile's name does not, in this case, answer this Court's concern with procedural safeguards. A newspaper must present its petition to the court that has jurisdiction over the delinquent. Thus the judge might not be a disinterested adjudicator; the judge would have the power to suppress a name the revelation of which would be embarassing to him. *Cf. New York Times Co.* v. *United States*, 403 U.S. at 724 (Douglas, J., concurring). If permission to publish is refused, the newspaper has the burden of petitioning for review of that decision. This Court clearly requires that once permission is denied, the state must vindicate the validity of the prior restraint by seeking judicial

affirmance of that decision. *Freedman* v. *Maryland*, 380 U.S. at 58-59, and it bears the burden of showing that publication should be restrained. Yet, should the newspaper lose under the statute at issue here, it, not the state, would bear the burden of instituting the appeal and the burden of proof on appeal. *Id.*

Furthermore, no provision guarantees that such a petition will result in prompt review. Time is of the essence in publishing newsworthy events. *See Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1328-29 (1975) (Blackmun, Circuit Justice). Every day the press is denied permission to publish amounts to a "flagrant, indefensible, and continuing violation of the First Amendment." *New York Times Co.* v. *United States, supra* at 715 (Black, J., concurring). In this case, the Respondents petitioned for an extraordinary remedy after their indictment. Although the West Virginia Court acted with admirable dispatch, significant time elapsed before a final order issued. Because the name had been published, the harsher effects of a prior restraint were not in issue. Had the Respondents withheld publication pending permission from the lower court and had it been necessary to appeal a refusal, the news story would have been delayed by several months, even if the court had acted with equal speed.[4]

The distinction between this Court's "First Amendment 'Due Process'"[5] cases and the case at bar lies in the judicial administration of the prior restraint. However, a prior restraint is just as pernicious in the hands of a judge, who might well not enjoy the insulation from the political

[4]The West Virginia Court issued a rule in prohibition several weeks before its judgment. Preliminary injunctive relief would not have been possible to it if it were reviewing the denial of authorization to publish, because such preliminary relief would have cleared the way for the publication of the name the juvenile, the very damage that the statute seeks to avert.

[5]Monaghan, First Amendment "Due Process", *supra*.

process that Article III provides for federal judges, as in those of an executive official. *Compare Nebraska Press Ass'n* v. *Stuart, supra, and New York Times Co.* v. *United States, supra, with Southeastern Promotions, Ltd.* v. *Conrad, supra, and Lovell* v. *City of Griffin, supra.* With a fundamental First Amendment right at stake, this Court should not be parsimonious with procedural protections, which as Justice Frankfurter recognized, are inseparable from the history of American freedom. *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (separate opinion).

CONCLUSION

WHEREFORE, in view of the above, *amici* respectfully request that this Court affirm the judgment of the West Virginia Supreme Court of Appeals, thereby vindicating the right of the press and the public to receive and publish information on governmental affairs and matters of concern to the public, information necessary to the survival of democratic government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard M. Schmidt, Jr., a member of the Bar of the United States Supreme Court, hereby certify that three true copies of the Motion of American Society of Newspaper Editors; Radio Television News Directors Association; National Newspaper Association; National Association of Broadcasters; The Society of Professional Journalists, Sigma Delta Chi; Reporters Committee for Freedom of the Press; National Press Club; Associated Press Managing Editors; West Virginia Press Association; Illinois Press Association; and Clarksburg Publishing Company for Leave to File Brief, *Amici Curiae*, in Support of Affirmance, and Brief *Amici Curiae* were served pursuant to Supreme Court Rule 33(1) by mailing the same through the United States Postal Service, first class postage prepaid, on this 25th day of January 1979, upon the following:

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